No. 91-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ENVIRONMENTAL DEFENSE FUND, INC.,
Petitioner,

—v.—

WHEELABRATOR TECHNOLOGIES INC. and
WESTCHESTER RESCO COMPANY, L.P.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does section 3001(i) of the Resource Conservation and Recovery Act ("RCRA") exempt a resource recovery facility from the obligations imposed on generators of hazardous waste by Subtitle C of RCRA where the ash generated by such a facility from the mass burning of household waste and commercial and industrial non-hazardous waste routinely exhibits a characteristic of hazardous waste?

2. If so, does a resource recovery facility remain exempt from the requirements of Subtitle C of RCRA in spite of the fact that the resource recovery facility receives and burns hazardous waste from small quantity generators of hazardous waste?

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Petitioner Environmental Defense Fund, Inc. ("EDF")[1] respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit, entered in this proceeding on April 24, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 931 F.2d 211, and is included in the Appendix at A-2. The memorandum opinion and order of the United States District Court for the Southern District of New York is reported at 725 F. Supp. 758, and is included in the Appendix at A-14.

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[1] EDF is a not-for-profit public benefit membership corporation. EDF has no stockholders or subsidiaries and is not a subsidiary of any corporation.

JURISDICTION

On April 24, 1991, the United States Court of Appeals for the Second Circuit entered judgment affirming the district court's entry of summary judgment against petitioner EDF. EDF did not petition for rehearing or suggest rehearing in banc. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved in this case is the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and regulations promulgated thereunder. Specifically, this case involves section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter [Subtitle C], if —
>
> (1) such facility —
>
> (A) receives and burns only —
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
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> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
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> (b) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility. Additional relevant statutory provisions and regulations are included in the Appendix, beginning at A-79.

STATEMENT OF THE CASE

Respondents Wheelabrator Technologies Inc. and Westchester Resco Company, L.P. (collectively "Wheelabrator") own and operate the Westchester Resource Recovery Facility ("Facility") in Peekskill, New York. The Facility is a resource recovery facility that receives and burns municipal solid waste, including household waste and non-hazardous commercial and industrial waste, for the purpose of generating electricity. The Facility processes approximately 650,000 tons of waste annually. As a result of the mass burning of this waste, the Facility generates approximately 500 tons of ash daily. Over 4 million tons of ash are generated annually by resource recovery facilities nationwide.

Under the relevant testing method promulgated by the Environmental Protection Agency ("EPA"), the ash generated by the Facility is a hazardous waste. However, the Facility does not comply with the obligations imposed on a generator of hazardous waste by Subtitle C of the federal Resource Conservation and Recovery Act ("RCRA"). For example, Wheelabrator does not prepare a manifest designating the ash as a hazardous waste. Nor is the ash otherwise handled and disposed of in a manner consistent with the hazardous waste requirements of RCRA.

On January 27, 1988, petitioner EDF brought this action in the United States District Court for the Southern District of New York. EDF alleged that Wheelabrator was violating RCRA by its failure to handle the ash generated at the Facility

as a hazardous waste. Wheelabrator did not dispute that it was not handling the ash as a hazardous waste, but argued that it was exempt from the requirements of Subtitle C by section 3001(i) of RCRA.

The parties filed cross motions for summary judgment. On November 21, 1989, the district court denied both motions. The court concluded that the ash generated by the Facility is exempt from the requirements of Subtitle C by section 3001(i). The court further concluded that Wheelabrator had in place adequate procedural safeguards to insure that the Facility did not receive hazardous waste and that, as a matter of law, a resource recovery facility could receive hazardous waste from a small quantity generator without forfeiting the exemption provided under section 3001(i). However, the district court denied summary judgment on Wheelabrator's motion in order to determine whether the Facility actually received hazardous waste on more than an inadvertent and occasional basis.

After further discovery on this issue, EDF stipulated to the entry of summary judgment against it. On May 4, 1990, EDF timely filed notice of appeal.

On April 24, 1991, the United States Court of Appeals for the Second Circuit entered judgment affirming the granting of summary judgment by the district court for the reasons stated by the district court in its opinion dated November 21, 1989.

On July 12, 1991, EDF applied to the Honorable Thurgood Marshall for an extension of time to file the petition for writ of certiorari on the ground that a companion case was pending in the United States Court of Appeals for the Seventh Circuit. Oral argument was had in that case on May 10, 1991. Because that case involves the same issue, its disposition could potentially conflict with the ruling below or further elucidate the issue involved. By order dated July 16, the Court granted EDF's application. On August 6, 1991,

EDF again applied for an extension of time to file the petition on the ground that judgment still had not entered in the companion case. By order dated August 13, 1991, the Court extended EDF's time to file the petition for writ of certiorari to September 20, 1991.[2]

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals For The Second Circuit Wrongly Concluded That A Resource Recovery Facility Is Exempt From The Obligations Imposed On Generators Of Hazardous Waste By Section 3001(i) Of The Resource Conservation And Recovery Act.

A. The Plain Language Of Section 3001(i) Does Not Exempt A Resource Recovery Facility From Federal Hazardous Waste Management Requirements As A Generator Of Hazardous Waste.

The Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, imposes on persons comprehensive hazardous waste management requirements regulating the handling and disposal of hazardous waste in order to protect the public health and the environment from waste that is potentially harmful, toxic or lethal. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6241. Under Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939b, solid waste that is specifically listed by the EPA as a hazardous waste or that exhibits a characteristic (ignitability, corrosivity, reactivity or toxicity) of hazardous waste, and that is not otherwise exempt, must be managed as

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[2] As of the date this petition was filed, the companion case was still pending in the Court of Appeals for the Seventh Circuit. Thus, the possibility that there will be a conflict between the circuits on this significant issue of federal environmental law remains.

a hazardous waste. 40 C.F.R. § 261.3a.[3] Solid waste that is not "hazardous" is regulated under subtitle D of RCRA, 42 U.S.C. §§ 6941-6949a, which merely forbids disposal of such waste in open dumps. 42 U.S.C. §§ 6944(a), 6945(a).

In 1984, Congress enacted, as part of the Hazardous and Solid Waste Amendments ("HSWA"), section 3001(i) of RCRA, 42 U.S.C. § 6921(i), to clarify the household waste exclusion promulgated by the EPA in 1980.[4] Section 3001(i) provides that a resource recovery facility shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under Subtitle C if such facility receives and burns only household waste and non-hazardous commercial and industrial waste. Accordingly, a qualifying resource recovery facility is exempt

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[3] "[T]he characteristics define broad classes of wastes that are clearly hazardous, while the listing process defines some wastes that may pass the characteristic, but are nonetheless hazardous wastes." 51 Fed. Reg. 21648, 21649, Col. 1 (June 13, 1986).

[4] The household waste exclusion provided simply that household waste, including the residue remaining after incineration, was not hazardous waste. In enacting RCRA, Congress was concerned that the hazardous waste permit program not be used "to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). Congress did not intend that individual households be deemed generators of hazardous waste subject to the requirements of Subtitle C, which would have imposed on households and municipalities a comprehensive regulatory scheme both unworkable and unnecessary. If households were to be deemed not to generate hazardous waste, then logically the subsequent *management* activities, which, under Subtitle C, are initiated by the generator, would similarly be deemed not to be hazardous waste management. Concern for the burden imposed on individual households and municipal management of household waste, however, says nothing about congressional intent as to the *generation* of ash with the characteristic of a hazardous waste by the incineration of household waste and commercial and industrial non-hazardous waste at a resource recovery facility. Nor would imposing the requirements of Subtitle C on the generators of such ash affect the exemption Congress intended for households and household *waste*.

from the hazardous waste management requirements of Subtitle C in its management activities.

Rather than simply ratify the existing EPA regulation, however, Congress clarified the household waste exclusion as it applied to a resource recovery facility in several significant respects. First, the exemption codified in section 3001(i) applies specifically, and exclusively, to a resource recovery facility, not a waste stream. Second, section 3001(i) provides that a resource recovery facility may receive and burn non-hazardous waste from commercial and industrial sources. Prior to 1984, waste from commercial and industrial sources was not exempt from the requirements of Subtitle C by the household waste exclusion.[5] Thus, if a resource recovery facility received such waste, it also would have been subject to these requirements. Finally, and perhaps most importantly, section 3001(i) limits the scope of the household waste exclusion by making explicit that a resource recovery facility that receives and burns qualified municipal solid waste only "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under [Subtitle C]." 42 U.S.C. § 6921(i).

Section 3001(i) does not provide, either explicitly or implicitly, that a resource recovery facility shall not be deemed to be generating hazardous waste. Nor does section 3001(i) provide that *ash* generated by a resource recovery facility that routinely exhibits a characteristic of hazardous waste shall be exempt from the requirements of Subtitle C. It is the absence of the term "generating" in section 3001(i) that is fatal to the construction of section 3001(i) adopted by the Court of Appeals for the Second Circuit. "[W]here, as here, 'the statute's language is plain, the sole function of the courts

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[5] The EPA has indicated that ash from the incineration of household waste and commercial and industrial non-hazardous waste had *always* been subject to regulation under Subtitle C: "These residues would be hazardous wastes under present [1980] EPA regulations if they exhibited a characteristic." 50 Fed. Reg. 28,725 (July 15, 1985).

is to enforce it according to its terms.' " *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Not otherwise exempt, like any other generator of hazardous waste, a resource recovery facility must comply with the requirements of Subtitle C as to the ash generated by the incineration process.

Under RCRA, both "management" and "generation" are terms of art with statutorily defined, non-overlapping, meanings. Hazardous waste generation is defined as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6). Hazardous waste management is defined as "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7).

Thus, the scope of the exemption in section 3001(i) is precisely ascertainable. First, hazardous waste management necessarily presumes the prior generation of hazardous waste. One cannot manage what does not exist. For this reason, the referent in section 3001(i) cannot be ash, which is generated after incineration. Rather, it is the systematic control of the *municipal solid waste* received by the resource recovery facility that is deemed not to be the management of hazardous waste. Second, section 3001(i) lists "treating," "sorting," "disposing of," and "or otherwise managing" as activities not attributable to a qualifying resource recovery facility for purposes of Subtitle C regulation. "Managing", of course, is merely the act of management. Accordingly, "or otherwise managing" can only mean what is left of the statutorily defined term: the collection, source separation, transportation, processing and recovery of the municipal solid waste received by a resource recovery facility. *See Colautti v. Franklin*, 439 U.S. 379, 392 n. 10 (1979) ("definition which declares what a term 'means' . . . excludes any meaning that is not stated").[6]

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[6] Significantly, a resource recovery facility engages in none of these management activities relative to ash.

Nothing in the plain language of section 3001(i) suggests that a resource recovery facility cannot be a generator of hazardous waste. Indeed, Congress clearly recognizes the significant difference between the management and generation of hazardous waste. Where Congress intends that a particular recovery process, in its entirety, be exempt from regulation under Subtitle C, it recognizes the necessity that it state so specifically. For example, RCRA also provides that "the owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, generating, transporting, treating, storing, or disposing of hazardous or liquid wastes." 42 U.S.C. § 6921 note. The Court of Appeals inexplicably ignores this critical statutory comparative. Yet, the inescapable conclusion from Congress' failure to include the term "generating" in section 3001(i) is that Congress did not intend so to extend the statutory exemption.

The Court of Appeals also relied on legislative history to support its conclusion. The Senate Report that accompanied the HSWA, in discussing section 3001(i), stated that "[a]ll waste management activities of such a [resource recovery] facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Regardless of the meaning of this language, section 3001(i) expressly *does not* exempt either a resource recovery facility as a generator, or the ash generated by such a facility, from the requirements of Subtitle C. Thus, the Court of Appeals erred in resorting to legislative history at all to contradict the unambiguous statutory language. *See Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *United States v. Locke*, 471 U.S. 84, 95-96 (1985).

In fact, the legislative history is in direct conflict with section 3001(i).[7] To that extent, of course, it must be disregarded. It is an obvious rule of statutory construction that when a conflict exists between a statute and its legislative history, the statute prevails. *Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("the [statutory] language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent"). Legislative history "is not a source of legal rules competing with those found in the U.S. Code." *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989). This notion of statutory primacy is particularly apt here. RCRA is a highly reticular statute, regulating the complex problem of solid and hazardous waste in the United States. Accordingly, a court should be particularly wary of departing from its statutory schema. *Cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (where Congress has carefully crafted an enforcement scheme with express remedies, a court must be chary of reading others into it).

The unsoundness of the tortured construction adopted by the Court of Appeals is made more evident by the alternative. If Congress really had intended to accomplish what respondents argue, it could easily have provided simply that a resource recovery facility that receives or burns only household or commercial or industrial non-hazardous waste, or the ash residue, shall not be subject to the requirements of Subtitle C. It did not. Moreover, nowhere does section 3001(i) state that the mass burning of municipal solid waste shall not be deemed to be generating hazardous waste. On its face, the section 3001(i) exemption only extends to those activities

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[7] This fact is confirmed by subsequent statements of the very Congressman involved in drafting section 3001(i) and the committee report on which the Court of Appeals relies. All six senator signatories to a letter to the EPA stating that section 3001(i) was not intended to exempt a resource recovery facility or ash from the requirements of Subtitle C, for example, were conferees and members of the Senate Committee that wrote the committee report. (*See* R-11 at Exh. 9.)

that can be deemed hazardous waste management. And under RCRA, the term "managing" does not include the term "generating."[8]

B. The Environmental Protection Agency Has Consistently Interpreted Section 3001(i) Not To Exempt A Resource Recovery Facility From The Requirements Of Subtitle C If The Ash Generated By Mass Burning Exhibits A Characteristic Of Hazardous Waste.

It is axiomatic that the interpretation of a statute by the agency having primary enforcement responsibility for that statute is entitled to deference. *Equal Employment Opportunity Comm'n v. Commercial Office Products Co.*, 486 U.S.

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[8] Loose draftsmanship is perhaps the best explanation for the language used by the committee, but, even assuming that it was proper for the Court of Appeals to consider legislative history in construing section 3001(i), the committee report does not necessarily contradict the plain meaning of section 3001(i). Although the report includes the term "generation" among waste management activities, the report significantly refers only to "waste," not toxic ash residue or hazardous waste, and is discussed in the context of incoming waste, and prior to incineration. This language is necessary to ensure a comprehensive exclusion for a resource recovery facility's management of the incoming municipal solid waste. For example, some waste received at the resource recovery facility that should be rejected at the gate could nonetheless inadvertently be accepted. If that waste is subsequently removed from the tipping floor, rather than put in the burning chamber, this could be regarded as waste "generated" at the facility. For the same reason, the committee report includes the term "disposal," although a resource recovery facility is obviously not a disposal facility. In fact, a significant portion of the solid waste received at any resource recovery facility either cannot be processed (5-15%) or must be bypassed. (R-40 at App. 26, p. 21.) For example, construction rubble, automobile parts and household appliances received by a resource recovery facility must be directly landfilled. (*Id.*) Further, waste received in excess of recovery capacity or during shutdown for maintenance or repairs must also be disposed of directly. (*Id.*) Without the deeming provision of section 3001(i), a resource recovery facility might have to dispose of this waste pursuant to the requirements of Subtitle C.

107, 115 (1988) (agency interpretation need not be the best one by grammatical or any other standards, it need only be reasonable). As this Court has previously stated, to sustain the view of the agency charged with administering the statute, a court "need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). Moreover, a contemporaneous agency construction is entitled to great weight. *E. I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977).

Contemporaneously with the enactment of section 3001(i), the EPA published a regulatory preamble interpreting Congress' clarification of the household waste exclusion. *See* 50 Fed. Reg. 28,725-26 (July 15, 1985) ("1985 Preamble"). The EPA recognized congressional intent to promote the development of resource recovery facilities, and that "the principal purpose of Section 3001[(i)] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations" applicable to a hazardous waste treatment, storage or disposal ("TSD") facility. 1985 Preamble at 28,726.

The EPA also recognized, however, that ash generated by a resource recovery facility from the burning of household and commercial and industrial non-hazardous waste "could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, *if toxic metals become concentrated in the ash*. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue." *Id.* (emphasis added.) Recognizing the fundamental difference between incoming waste and the ash generated from the mass burning of that waste, the EPA unequivocally concluded that by the language of section 3001(i)

Congress did not intend "to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." *Id.*[9]

The EPA further concluded, however, that it then had "no evidence" as to whether the ash generated by a resource recovery facility would exhibit a characteristic. Because the EPA did not "believe the HSWA impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste," it therefore indicated that "the Agency has no plans to impose additional responsibilities on these facilities." *Id.* Thus, the EPA did not intend additionally to regulate ash generated by a resource recovery facility by *listing* that ash as a hazardous waste regardless of characteristic. As noted previously (*supra*, p. 7 n. 5), under existing regulations, ash displaying a characteristic would not be exempt from the requirements of Subtitle C.[10]

Significantly, the EPA had before it the legislative history that the Court of Appeals found so compelling. In spite of

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[9] In 1987, one EPA official stated that the EPA was re-evaluating its 1985 interpretation, which "may have been in error." Statement of J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response before the Subcommittee on Hazardous Waste and Toxic Substances of the Senate Committee on Environment and Public Works (December 3, 1987) 16-17. However, the EPA subsequently reaffirmed its contemporaneous interpretation. *See Regulation of Municipal and Solid Waste Incinerators: Hearing Before the Subcomm.ttee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. (May 11, 1989) (testimony of Sylvia Lowrance, Director, EPA Office of Solid Waste). Thus, although the EPA has indicated, from time to time, that it considers the language of section 3001(i) ambiguous or that it wishes further congressional clarification, as a matter of *interpretative policy*, the EPA has never revised its 1985 interpretation.

[10] EDF has offered undisputed evidence that the ash generated by the Facility routinely exhibits a characteristic of toxicity due to the concentration of lead and cadmium.

the language in the committee report, however, which included the term "generation," the EPA determined that section 3001(i) did not exempt toxic ash residue, or a resource recovery facility as the generator of that ash, from the hazardous waste regulatory scheme. Mindful of the purpose of RCRA generally and section 3001(i) specifically, the EPA, unlike the courts below, properly disregarded, or interpreted, the seemingly contradictory language in the legislative history.

Courts are not in the business of assessing the relative wisdom of competing statutory interpretations. The EPA's interpretation of section 3001(i) is not only reasonable, which is all that it must be, it is required by the statutory language and congressional intent. Accordingly, the Court of Appeals erred in rejecting the EPA's interpretation.

II. The Court Of Appeals Has Construed Section 3001(i) Inconsistently With The Policy Underlying The Management of Hazardous Waste And In A Manner That Renders RCRA's Entire Regulatory Scheme Inoperable.

The Court of Appeals has wrongly construed the language of a significant federal statute. This Court has frequently granted a petition for writ of certiorari for that reason alone. *See, e.g., Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985) (certiorari granted to resolve a conflict and to decide an important question of environmental law); *Morton v. Ruiz*, 329 U.S. 296, 301-02 (1974) (certiorari granted because of the significance of the issue and the assertion that the appellate court judgment was inconsistent with long-established administrative policy); *American Fed'n of Musicians of the United States & Canada v. Wittstein*, 379 U.S. 171, 175 (1964) (certiorari granted because federal question important and one of first impression).

That said, this Court typically does not act as a reviewing court to correct every wrong appellate decision. Here, however, the Court of Appeals for the Second Circuit did not

simply misconstrue section 3001(i) of RCRA, itself the statutory linchpin of hazardous waste management in the United States. The holding of the Court of Appeals is fundamentally inconsistent with, indeed vitiates, the policy underlying the management of hazardous waste codified by Congress in RCRA. Moreover, the effect of the appellate court's judgment is to render the entire post-generation regulatory scheme of Subtitle C inoperable as it applies to toxic ash residue. For these additional reasons, the Court should grant this petition.

A. The Judgment Of The Court of Appeals Is Fundamentally Inconsistent With The Policy Underlying RCRA's Hazardous Waste Management Requirements.

Section 3001(i) was enacted as part of the Hazardous and Solid Waste Amendments of 1984. The primary purpose of the HSWA was to fill "serious gaps" in RCRA's regulatory scheme that allowed significant amounts of hazardous waste to escape control. H.R. Rep. No. 198, 98th Cong., 2d Sess. 19-20, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5578-79. The HSWA "broadened the scope of [RCRA] and tightened the regulatory restraints." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 506 (1986). In so doing, Congress intended to "minimize the present and future threat to human health and the environment" caused by the improper management of hazardous wastes. 42 U.S.C. § 6902(b); *see also Midlantic*, 474 U.S. at 505 (HSWA indicative of repeated congressional emphasis on its goal of protecting the environment against toxic pollution).

It is undisputed that Congress also intended to promote the development of "resource recovery and resource conservation systems *which preserve and enhance the quality of air, water and land resources.*" 42 U.S.C. § 6902(7) (emphasis added). From this language, however, it is clear that any attempt to construe section 3001(i) must be consistent with the overarching policy objective to protect human health and

the environment. *Cf. Crandon v. United States*, 110 S.Ct. 997, 1001 (1990) (courts should look to object and policy of statute in construing statute).

In order to encourage the development of commercially viable resource recovery facilities, Congress excluded such facilities from, among other requirements related to the management of hazardous waste, the substantial requirements imposed on a hazardous waste treatment, storage or disposal facility. Section 3001(i) makes clear that a qualifying resource recovery facility will not be deemed to be a TSD facility.[11] However, recognizing the fundamentally transformed character of ash generated by the mass burning of municipal solid waste, Congress chose not to exclude that ash, or the resource recovery facility that generates the ash, from the requirements of Subtitle C. Because the regulatory burden imposed on generators of hazardous waste under Subtitle C is far less onerous than that imposed on managers of hazardous waste, Congress could thus still encourage the development of resource recovery facilities while ensuring that management of

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[11] The Court of Appeals misapprehends the purpose and structure of the "deemed to be" phrase in section 3001(i). The Court of Appeals, in adopting the reasoning of the district court, concluded that if a resource recovery facility only accepts non-hazardous waste (as household waste is defined, for example), it could not be designated a TSD facility anyway, and if it did accept hazardous waste, the facility would lose the exemption. Thus, the district court reasoned that section 3001(i) must apply to the ash generated by a resource recovery facility, otherwise there would be no benefit to the statutory exemption. (A-30 n. 12.) The argument, however, is circular: to the extent this is true, it is true *because of* section 3001(i). Household waste contains material, such as paints, waste oils, pesticides, solvents and cleaning agents, that, reading RCRA literally, could require that household waste be identified as a hazardous waste. In order to avoid this result, section 3001(i) provides that a resource recovery facility, although perhaps literally doing so, shall not be *deemed* to be managing hazardous waste. Without *this* exclusion, a resource recovery facility would be subject to the requirements of Subtitle C upon receipt of municipal solid waste. This is precisely the reason Congress enacted, and the benefit of, section 3001(i).

the ash is accomplished in a manner consistent with the primary objective of RCRA to protect human health and the environment.

"In the face of Congress' undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances" (*Midlantic*, 474 U.S. at 506), it is remarkable to suggest that Congress, in an effort to encourage resource recovery from waste, would be indifferent to the generation of hundreds of tons of ash each day (at only one facility, *see* R-11 at p. 6) with a characteristic of toxicity that exceeds the legal limit by as much as five times for lead and seven times for cadmium. (R-34 at ¶ 23.)[12]

In fact, as of 1988, there were 111 resource recovery facilities in operation in the United States, with more than 200 additional facilities in the planning or construction stage. (R-16 at App. 21, p. 6.) These facilities generate approximately 4 *million* tons of ash residue annually. (*Id.*, p. 1.) It defies logic to conclude, as did the Court of Appeals, that Congress would exempt this staggering quantity of toxic ash residue from regulation as hazardous waste when, in fact, the HSWA amended RCRA so that a person who generates hazardous waste only in excess of *100 kilograms per month*, rather than the previous 1000 kilograms per month, is subject to the requirements of Subtitle C. *See* 42 U.S.C. § 6921(d). Indeed, it is no overstatement that such a construction of section 3001(i) vitiates the policy underlying RCRA that hazardous waste shall be properly managed. Fundamental to this policy surely is the notion that millions of tons of hazardous waste cannot be simply landfilled alongside newspapers and soda bottles.

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[12] References to the record below are cited by record index number as "R- at ."

The Court of Appeals improperly disregarded the careful balance of benefits and controls struck by Congress in enacting section 3001(i). That balance should not be disturbed by mere judicial fiat, especially where the result is so demonstrably at odds with Congress's effort safely to control the handling and disposal of hazardous waste. Therefore, this Court should reject the appellate court's conclusion that ash with the characteristic of toxicity, and the facility generating that ash, are exempt from the requirements of Subtitle C.[13]

B. The Judgment Below Renders RCRA's Entire Post-Generation Hazardous Waste Regulatory Scheme Inoperable As It Applies To Ash.

It is "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperable." *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)). The Supreme Court does not "construe statutory phrases in isolation; [it] read[s] statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).

It is undisputed that the ash generated at the Facility routinely exhibits a characteristic (toxicity) of hazardous waste. The appellate court concluded that pursuant to section 3001(i) a resource recovery facility generating this identifiable hazardous waste is nonetheless exempt from the requirements of Subtitle C. Recall, however, that section 3001(i) is specifically limited to a resource recovery facility. Section 3001(i) provides only that a resource recovery facility shall not be deemed to be managing hazardous waste. Section 3001(i) says nothing about the ash residue itself, which, if a

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[13] Numerous states have recognized that section 3001(i) does not exempt ash residues from hazardous waste regulations, including Alabama, California, Maine, Minnesota, Pennsylvania, Vermont and Wisconsin. (R-12 at p. 3.)

hazardous waste, remains subject to the handling and disposal requirements of Subtitle C. Nor does it provide, for example, that a transporter who transports ash shall not be deemed to be transporting a hazardous waste.

Under RCRA, it is the generator that must determine whether a particular solid waste is a hazardous waste. 40 C.F.R. § 262.11. If the waste is identifiable as a hazardous waste, the generator must then prepare a manifest "to identify the quantity, composition, and the origin, routing and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment or storage." 42 U.S.C. § 6903(12). The generator is also required to designate on the manifest a licensed disposal facility to receive the hazardous waste. 40 C.F.R. 262.20-.23. Thus, the entire hazardous waste management scheme depends upon the generator's "gatekeeper" function and the preparation of the manifest.

Even assuming that the Court of Appeals properly construed section 3001(i), as indicated above, section 3001(i) applies only to the resource recovery facility generating the ash. Under Subtitle C, a transporter, for example, still may not accept hazardous waste unless it is accompanied by a manifest. 40 C.F.R. § 263.20. Nor can a disposal facility regularly accept ash not accompanied by a manifest. *See* 42 U.S.C. § 6924. The Court of Appeals, however, concluded that a resource recovery facility need not prepare a manifest. In other words, no transporter could transport, no disposal facility could dispose, no storage facility could store the ash received from a resource recovery facility without violating Subtitle C! This statutory "catch-22" highlights the basic flaw in the appellate court's construction of section 3001(i).

Transporters and TSD facilities are in violation of RCRA each time they accept unmanifested ash identifiable as a hazardous waste from a resource recovery facility, and are subject to criminal and civil penalties. But there literally is no way they *can* comply with RCRA's requirements so long as

the resource recovery facility that generates the ash is not required to prepare a manifest. It is obviously undesirable to construe a statute to impose obligations on a person where that person lacks the ability to comply with those obligations by virtue of a provision within the same statute. Yet this is precisely the result of the judgment below: hazardous waste in a regulatory vacuum.

Not surprisingly, respondents and the courts below have "offered no reason for attributing this futile design to . . . Congress." *Mountain States*, 472 U.S. at 249. There is none. The *only* construction that renders all the parts of Subtitle C, as it applies to ash that exhibits a characteristic, a compatible whole is that adopted by the EPA in 1985 and advanced by EDF in the court below, and which treats a resource recovery facility as a potential generator of hazardous waste. Therefore, this Court must correct the unworkable construction of section 3001(i) adopted by the Court of Appeals.

III. The Court of Appeals Wrongly Concluded That A Resource Recovery Facility May Accept Hazardous Waste From A Small Quantity Generator Of Hazardous Waste And Remain Exempt Under Section 3001(i).

Hazardous wastes generated by small quantity generators are identified as hazardous wastes under section 3001(d) of RCRA, 42 U.S.C. § 6921(d). However, small quantity generator hazardous waste is expressly exempt from much of the regulato-ry scheme imposed on hazardous waste under RCRA. For example, a small quantity generator is generally authorized to deliver its waste to a non-hazardous waste management facility. 40 C.F.R. §§ 261.5(a), 261.5(g)(3)(iv).

Section 3001(i), however, specifically provides that a resource recovery facility is exempt from the requirements of Subtitle C if it receives and burns *only* household waste and *non-hazardous* solid waste from commercial and industrial

sources. 42 U.S.C. § 6921(i)(1)(A).[14] Consequently, if the Facility knowingly or regularly receives and burns small quantity generator hazardous waste, it is not exempt under section 3001(i).[15]

Only by fundamentally rewriting section 3001(i) could the Court of Appeals construe section 3001(i) to allow the Facility routinely to receive hazardous waste from small quantity generators. Section 3001(i) does not read "household waste, non-hazardous commercial or industrial waste or small quantity generator hazardous waste." Indeed, its terms could not be plainer. Nor does the straightforward reading of section 3001(i) significantly limit the ability of a small quantity generator to dispose of its waste. A small quantity generator can still dispose of its waste virtually unfettered (the vast majority of waste in the United States is disposed of in landfills). Section 3001(i) only provides that a *resource recovery facility* may not accept such waste without foregoing its exemption.

In reaching its conclusion, the Court of Appeals apparently ignored the fundamental transformation that takes place when municipal solid waste is incinerated to ash. The fact that heavy metals concentrate in ash residue only underscores why Congress was so stringent at the "front end" by

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[14] The legislative history indicates that the language in section 3001(i) is not as absolute as it seems. Even assuming this is true, receipt by a resource recovery facility of hazardous waste can only be inadvertent and occasional, not routine. *See* S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).

[15] Because the district court concluded that a resource recovery facility may accept waste from a small quantity generator without losing its exemption under section 3001(i), and granted Wheelabrator motion for summary judgment on this issue, EDF did not conduct discovery on Wheelabrator's actual receipt of small quantity generator hazardous waste.

providing that resource recovery facilities shall not burn hazardous wastes. The Court of Appeals' conclusion to the contrary is inconsistent with section 3001(i) and must be rejected.

CONCLUSION

For the foregoing reasons, the requested writ of Certiorari should issue.

Respectfully submitted,

/s/

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of April, one thousand nine hundred and ninety-one.

Present: HON. THOMAS J. MESKILL
HON. ROGER J. MINER
HON. FRANK X. ALTIMARI

Circuit Judges,

ENVIRONMENTAL DEFENSE FUND, INC.,

Plaintiff-Appellant,

-v-

WHEELABRATOR TECHNOLOGIES, INC.,
WESTCHESTER RESCO COMPANY, L.P.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from a judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court

with costs to be taxed against the appellant.

A TRUE COPY
ELAINE B. GOLDSMITH

/s/

Elaine B. Goldsmith,
Clerk
By:

/s/
Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____*_____

No. 1219--August Term, 1990
(Argued March 18, 1991
Decided April 24, 1991)

_____*_____

ENVIRONMENTAL DEFENSE FUND, INC.,

Plaintiff-Appellant,

-v.-

WHEELABRATOR TECHNOLOGIES, INC.,
WESTCHESTER RESCO COMPANY, L.P.,

Defendants-Appellees.

_____*_____

B e f o r e :

MESKILL, MINER and ALTIMARI,
Circuit Judges.

_____*_____

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Haight, *J.*, granting summary judgment in favor of the defendants.

Affirmed.

_____*_____

R. EDWARD WILHOITE, JR., Despres, Schwartz & Geoghegan, Chicago, IL (Robert L. Graham, Laura A. Kaser, Gretchen M. Livingston, Robert L. Denby, Jenner & Block, Chicago, IL, Karen Florini, Environmental Defense Fund, Washington, D.C., of counsel), *for Appellant*.

JOHN G. KOELTL, New York, NY (Daniel G. Murphy, Ted S. Ward, Debevoise & Plimpton, New York, NY, Harold Himmelman, David M. Friedland, Stanley S. Sokul, Beveridge & Diamond, Washington, D.C., of counsel), *for Appellees*.

———*———

MESKILL, *Circuit Judge*:

This is an appeal from a judgment entered in the United Sates District Court for the Southern District of New York, Haight, *J.*, on April 16, 1990, granting summary judgment in favor of the defendants Wheelabrator Technologies, Inc. and Westchester Resco Company, L.P. (collectively "Wheelabrator"), and dismissing plaintiff Environmental Defense Fund's (EDF) complaint with prejudice. Judgment was

entered pursuant to Judge Haight's order of April 9, 1990. Prior to ordering entry of judgment, Judge Haight had issued an opinion dated November 21,1989, which examined EDF's claims. *See Environmental Defense Fund v. Wheelabrator Tech., Inc.*, 725 F.Supp. 758 (S.D.N.Y. 1989). In that opinion, Judge Haight fully set forth his findings of fact and conclusions of law. *See id.* The district court, however, delayed ordering the entry of final judgment pending further discovery. The district court's findings and conclusions of November 21, 1989 provide the basis for this appeal. Assuming the reader's familiarity with that opinion, we offer only a limited discussion of the relevant background.

Wheelabrator operates a resource recovery facility, popularly known as a "trash-to-energy" facility, where solid waste generated in Westchester County is

delivered and incinerated. The end-product of this incineration process is residue ash. The manner in which Wheelabrator disposes of this residue ash provides the underlying basis for the instant controversy. EDF contends that this residue ash is a "hazardous waste" which must be disposed of in accordance with the provisions of Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA) (often called the "Solid Waste Disposal Act"), 42 U.S.C. §§ 6921-39b. Wheelabrator maintains that the ash, under the existing statutory and regulatory scheme, can be disposed of as non-hazardous solid waste under Subtitle D of the RCRA, 42 U.S.C. §§ 6941-49a. Wheelabrator argues that Section 3001(i) of the RCRA, 42 U.S.C. § 6921(i), which was adopted in 1984, specifically grants an exclusion from the hazardous waste regulations to the ash that is the end-product of

a resource recovery facility's incineration process.

EDF also advances an alternative argument. EDF contends that even assuming Section 3001(i) grants an exclusion to the residue ash, Wheelabrator cannot avail itself of the benefits of that exclusion because it has taken inadequate steps to ensure that hazardous wastes are not being incinerated and it accepts small amounts of hazardous waste from "small quantity generators." *See* 40 C.F.R. § 261.5(a) (defining the term). In response, Wheelabrator asserts that "small quantity generators" are authorized by federal regulation to deliver their hazardous waste for disposal to any waste facility that is "[p]ermitted, licensed, or registered by a State to manage municipal or industrial solid waste." 40 C.F.R. § 261.5(g)(3)(iv). Wheelabrator also claims that its contractual arrangements with those who deliver

solid waste for incineration adequately ensure against the receipt of hazardous wastes.

The threshold question that we must address is whether Congress, in adopting the Clean Air Act, [sic] Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990), intended to preclude the enforcement of existing environmental laws and regulations as they relate to the disposal of incinerator ash, thereby mooting the controversy currently before us. We note that this legislation was enacted after the district court's decision.

Our review of the relevant statutory provision and the accompanying legislative history convinces us that Congress did not intend to erect a bar to the enforcement of pre-existing environmental statutes and regulations. Section 306 of the Clean Air Act Amendments of 1990 provides:

> For a period of 2 years after the date of enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the [EPA] pursuant to section 3001 of the Solid Waste Disposal Act. Such reference and limitation shall not be construed to prejudice, endorse or otherwise affect any activity by the Administrator following the 2-year period from the date of enactment of the Clean Air Act Amendments of 1990.

Pub. L. No. 101-549, 104 Stat. 2399, 2584 (1990). The plain language of the statute precludes the EPA from "regulating" incinerator ash for two years. The precise meaning of the term "regulate," however, is in our view at best ambiguous. We, therefore, look to the statute's legislative history for guidance.

The legislative history provides us with a rather clear indication of Congress' intent. The House and Senate Conferees offered the following explanations:

> The conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator Inc.*,

> 725 F. Supp. 758 (2d Cir.) [sic] and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.), or any State activity regarding ash.

H.R. Conf. Rep. No. 952, 101st Cong., 2nd Sess. 335, 342 *reprinted in* 1990 U.S. Code Cong. & Admin. News 3867, 3874. The plain import of this statement is that Congress consciously made a decision not to express an opinion regarding the instant case and a companion case being litigated in the Seventh Circuit. Indeed, it is obvious that Congress had no intention of rendering judicial review of the instant case moot. Moreover, the statement is consistent with a congressional intention to see that the applicable regulatory scheme currently in existence is not rendered null and void as it relates to the regulation of incinerator ash. Finally, by imposing a two year moratorium on any *new* EPA regulatory activity concerning incinerator ash, Congress simply may have desired to main-

tain the status quo pending judicial resolution of the issues presented here and in *City of Chicago*. Once the courts have spoken, Congress will be in a better position to evaluate its options regarding the treatment of incinerator ash and to direct its future legislative efforts accordingly.

Having concluded that the case is properly before us, we now direct our attention to the district court's decision. The district court rejected EDF's arguments and ultimately ordered that judgment be entered in favor of Wheelabrator. Specifically, in its November 21, 1989 decision, the district court held that Section 3001(i) of the RCRA grants an exclusion from the hazardous waste regulations to the residue ash which is produced by the incineration of solid municipal waste. The district court also concluded that applicable federal regulations permit "small

quantity generators" of hazardous waste to dispose of that waste at any facility, including a resource recovery facility, that is "[p]ermitted, licensed, or registered by a State to manage municipal or industrial solid waste." 40 C.F.R. § 261.5(g)(3)(iv). Finally, the court held that Wheelabrator, through its contractual arrangements for the delivery of solid municipal waste, had in place legally sufficient controls to ensure that unauthorized hazardous wastes would not be delivered to the resource recovery facility for disposal.

After carefully reviewing Judge Haight's thorough and well reasoned opinion, we agree with his analysis of the legal issues. Accordingly, we affirm the April 16, 1990 judgment of the district court for the reasons stated by Judge Haight in his opinion dated November 21, 1989. *Environmental Defense Fund* v.

Wheelabrator Tech., Inc., 725 F.Supp. 758 (S.D.N.Y. 1989).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENVIRONMENTAL DEFENSE FUND, INC.,	:	88-CIV.-0560 (CSH)
Plaintiff,	:	
-against-	:	
WHEELABRATOR TECHNOLOGIES, INC. and WESTCHESTER RESCO COMPANY, L.P.,	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

APPEARANCES:

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Attorneys for The Institution of Resource Recovery.

NIXON, HARGRAVE, DEVANS & DOYLE, 30 Rockefeller Plaza, New York, New York 10112, Frank H. Penski, Esq., Philip F. Cronin, Jr., Esq., Richard M. Cogen, Esq., and Dexter Ewel, Esq., of counsel.

THE UNITED STATES CONFERENCE OF MAYORS, Office of the General Counsel, 1620 Eye Street, N.W., Washington, D.C. 20006, Gerard L. Lederer, Esq., of counsel.

Attorneys for The United States Conference of Mayors and The National Resource Recovery Association.

HAIGHT, District Judge:

This important environmental case raises issues of the proper construction of a federal statute governing hazardous waste, and defendants' compliance with the statutory and regulatory scheme.

The case is now before the Court on defendants' motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., or in the alternative, for summary judgment pursuant to Rule 56(b), and plaintiff's cross-motion for summary judgment pursuant to Rule 56(a). 1/

1/ By leave of Court, briefs amici curiae supporting plaintiff were filed by the American Public Health Association, the American Federation of State, County & Municipal Employees, and Tricil, Inc.

Briefs supporting defendants were filed by the County of Westchester, the New York State Department of Environmental Conservation, the Institution of Resource Recovery, and the National Resource Recovery Association and the United States Conference of Mayors (joint brief).

Background

Statutory Framework

Plaintiff the Environmental Defense Fund, Inc. ("EDF") contends that defendants have violated certain portions of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 et seq., and the regulations promulgated thereunder both by the federal Environmental Protection Agency ("EPA") and the New York Department of Environmental Conservation ("DEC").[2/]

Subtitle C of the RCRA "established a 'cradle to grave' regulatory scheme governing the treatment, storage, and disposal of hazardous wastes."[3/] Environmental De-

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[2/] EDF does not allege an independent violation of state law, but rather claims that "[v]iolation of the New York regulations . . . constitutes violation of regulations that have become effective pursuant to Subtitle C of RCRA." Complaint at ¶ 11.

[3/] The EPA promulgated regulations pursuant to the RCRA dealing with the classification of solid wastes as either hazardous or non-hazardous. Certain wastes are listed as per se hazardous. 40 (continued...)

fense Fund v. E.P.A., 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 1120 (1989). Solid wastes not classified as hazardous are regulated under Subtitle D of the statute.

Pursuant to Section 3006(b) of the RCRA, 42 U.S.C. § 6926(b), a state may seek authorization from the EPA to administer and enforce a hazardous waste program in that state. If the Administrator of the EPA accepts the state's proposed program as in keeping with the strictures of federal law, the state is authorized to administer its program in place of a federal program. The EPA, however, retains responsibility for overseeing the hazardous waste programs of the states.

3/ (...continued)
C.F.R. § 261.30-261.33(f). Those wastes not listed by the EPA as per se hazardous are deemed such only if they exhibit one of the following four characteristics: corrosivity, ignitability, reactivity, or toxicity, 40 C.F.R. § 261.21-261.24, and are not otherwise exempt from classification as a hazardous waste. 40 C.F.R. § 261.3(a)(1).

On May 29, 1986, New York's application to operate a hazardous waste program in lieu of the federal program was granted. The New York regulations, which mirror those promulgated by the EPA, are codified at 6 N.Y. Comp. Codes R. & Regs. Parts 370-374 ("NYCRR").

Factual Background

Plaintiff EDF is a "non-profit, public benefit membership corporation organized under the laws of the State of New York." Complaint at ¶ 4. EDF characterizes itself as "a national environmental advocacy organization supported by approximately 60,000 dues-paying members." Id.

Defendants Wheelabrator Technologies Inc. ("WTI") and Westchester Resco Company, L.P. ("Resco") own and operate the Westchester Resource Recovery Facility[4/] ("the

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[4/] A resource recovery facility "refers generally to facilities that burn solid waste in order to recover useful thermal energy (as steam or electricity) and to reduce the weight and volume of (continued...)

Facility") in Peekskill, New York. Resco designed the Facility pursuant to a 1981 agreement entered into by the County of Westchester and Wheelabrator-Frye Inc.[5/]

The Facility processes approximately 650,000 tons of solid waste, both household and non-hazardous municipal waste, annually. In processing that amount of solid waste, the Facility generates roughly 330 million kilowatt hours of electricity each year. A byproduct of the waste recovery process is ash. Approximately 500 tons of ash are produced by the Facility daily. EDF contends that the ash is a hazardous

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4/ (...continued)
waste requiring landfill disposal." Affidavit of Ronald J. Broglio sworn to on March 19, 1988 at ¶ 4.

5/ Wheelabrator-Frye Inc. is a predecessor of WTI.

waste[6/] and must therefore be disposed of as such.

Specifically, EDF contends that defendants are in violation of federal regulations requiring that generators of hazardous waste apply for and receive a United States EPA number before engaging in the treatment, storage, disposal, transportation, or offering for transportation of hazardous waste. 40 C.F.R. § 262.12. An analogous requirement is found in the New York state framework. 6 NYCRR § 371.3.

It is uncontested that the ash produced by the Facility is not dealt with pursuant to the regulations governing the handling and disposal of hazardous wastes.

6/ The ash produced at the Facility failed the EP toxicity test, Procedure set forth at Appendix II to 40 C.F.R. § 261.33, nine out of the past ten times samples have been tested. Exhibit 2 attached to Plaintiff's Memorandum; Defendants' Exhibit 24 at B-6. The EP toxicity test is a measure of the hazardous qualities of solid waste. See Al Tech Specialty Steel Corp. v. E.P.A., 846 F.2d 158, 160 (2d Cir. 1988) (per curiam) (waste is subject to regulation as hazardous where it fails the EP toxicity test, a characteristic of hazardous wastes).

The Westchester County Refuse Disposal District No. 1 ("District") owns and operates an ashfill where the Facility's ash is brought for disposal. That ashfill, the Sprout Brook Residue Disposal Site ("Sprout Brook"), located in Cortlandt, New York, is not a licensed hazardous waste disposal facility.[7/] Defendants have further not complied with those regulations governing the transportation and disposal of hazardous waste.[8/]

7/ Disposal facilities dealing with hazardous waste must also obtain an EPA identification number. 40 C.F.R. § 262.12. Again, an analogous regulation is found in the New York state scheme. 6 NYCRR § 371.3.

8/ Generators of hazardous waste are required to prepare a shipping manifest designating a licensed disposal facility. The generator is to maintain a copy of the manifest on file. 40 C.F.R. § 262.20-.23. 6 NYCRR § 372.2(a), 372.2(b)(5)(iii).

Before shipping, hazardous waste must be packaged, labelled, marked, and placarded according to specific regulations. 40 C.F.R. § 262.30-.33, 6 NYCRR § 372.2(a)(4)-(7). Hazardous waste must further be accumulated in labelled containers. 40 C.F.R. § 262.34, 6 NYCRR § 372.2(a)(8).

A generator of hazardous waste must also maintain certain records and is required to submit an annual report to the state DEC. 40 C.F.R. § 262.40-.43, 6 NYCRR § 373.2(c).

EDF contends that defendants' generation of ash which fails the EP toxicity test subjects the handling of that ash to federal regulations governing the generation, management and disposal of hazardous wastes. Defendants do no contest that they are not in compliance with those regulations, but rather argue that the RCRA itself exempts resource recovery facilities from the strictures of Subtitle C.

Plaintiff argues that the regulatory "EP [toxicity] test governs as a matter of law", citing Al Tech Specialty Steel Corp. v. E.P.A., supra; and, "since defendants have admitted that their ash fails the EP toxicity test and that they do not comply with the hazardous waste laws, plaintiff is entitled to judgment as a matter of law." Plaintiff's Reply Memorandum at 3-4, 1.

The argument assumes its basic premise: that defendants are subject to hazardous waste regulation under Subtitle C, of

which the EP toxicity test forms a part. But if a proper construction of the statute excludes defendants from compliance with hazardous waste laws, their conceded non-compliance has no legal significance. The Second Circuit's opinion in Al Tech does not change this analysis, since the corporate defendant in that case, a specialty steel maker which constructed a collection basin on its property to deal with toxic precipitations, did not claim a statutory exclusion from hazardous waste regulation, and could not have done so.

I turn then to the statutory and regulatory scheme.

Discussion

In May 1980, after the 1976 passage of the RCRA, the EPA implemented a regulatory provision termed the "household waste

exclusion."[9/] In the preamble to the 1980 household waste exclusion, the EPA made clear that the ash residue produced as a byproduct of the incineration of household waste was exempt from regulation under Subtitle C of the RCRA.

> The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded in all phases of its management, residue remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste. Such wastes, however, must be transported, stored, treated and disposed in ac-

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9/ That exclusion provided as follows:

> § 261.4 Exclusions
>
> (b) Solid wastes which are not hazardous wastes.
>
> The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

45 Fed. Reg. 33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)).

> cordance with applicable State and federal requirements concerning management of solid waste (including any requirements specified in regulations under Subtitle D of RCRA.) . . . .

45 Fed. Reg. 33,099 (May 19, 1980). The EPA went on to note that when "household waste is mixed with other hazardous wastes, . . . the mixture will be deemed hazardous" and thus subject to the regulations of Subtitle C. Id. It is common ground that the ash resulting from the incineration of household waste is not subject to regulation as a hazardous waste.[10/]

In 1984 Congress sought to "clarify" the household waste exclusion in respect of its applicability to municipal wastes generally, including non-hazardous commer-

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10/ Although the parties are in agreement that the 1980 exclusion extends to ash residue, EDF takes exception to the EPA's judgment that Congress intended such an exemption. Plaintiff's Memorandum at 25 n. 14 ("plaintiff considers the application of the pure household waste exclusion to ash residues inconsistent with the statute"); Plaintiff's Reply Memorandum at 12 ("EPA's justification for applying the household waste exclusion to ash -- itself of doubtful validity -- was the perceived Congressional intent to exclude an entire waste stream").

cial and industrial wastes. Congress therefore enacted the following provision:

> (i) Clarification of household waste exclusion
>
> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if --
>
> (1) such facility --
>
> (A) receives and burns only --
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures

to assure that hazardous wastes are not received at or [sic] burned in such facility.

RCRA Section 3001(i), 42 U.S.C. § 6921(i).[11/] The instant controversy

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11/ The equivalent regulation is found in the New York scheme.

(2) Solid wastes which are not hazardous wastes. The following solid wastes are not hazardous wastes:

> (i) household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuels) or reused. Household waste means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas). A resource recovery facility managing municipal waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purpose of regulation, if such facility:
>
> (a) receives and burns only:
>
> (1) household waste (from single and multiple dwellings, hotels, motels and other residential sources); and
>
> (2) solid waste from commercial or industrial sources that does not contain hazardous waste; and
>
> (b) does not accept hazardous waste and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in the facility.

NYCRR § 371.1(e)(2)(i) (1987) (emphasis in original).

centers on the proper construction and scope of the 1984 clarification.

Defendants contend that Section 3001(i) exempts the Facility from those regulations, codified at 40 C.F.R. Part 262, governing the generation of hazardous waste. Plaintiff argues that Section 3001(i) does not exempt resource recovery facilities accepting commercial wastes from regulations governing the generation of hazardous waste, but only from those regulations, codified at 40 C.F.R. Parts 264-68 and 270, concerning the management of hazardous waste.[12/]

12/ EDF contends that Section 3001(i) merely exempts the Facility from regulation as a treatment, storage and disposal ("TSD") facility (facilities that manage, rather than produce hazardous waste). However, by its own terms Section 3001(i) does not apply to resource recovery facilities that accept hazardous waste for incineration, and plaintiff argues that if a resource recovery facility should ever accept hazardous waste, even accidentally, it would not be eligible for exemption even from regulation as a TSD facility. Under plaintiff's construction of Section 3001(i) it is difficult to understand what, if any, benefit the Facility derives from the exemption. Plainly, if the Facility never accepts hazardous waste for processing, it would not be subject to regulation as a TSD facility even absent the exclusion.

I. Construction of Section 3001(i)

A. Plain Language of the Statute

Defendants contend that Section 3001(i) is clear in its intent to exclude the ash generated by the waste recovery process from regulation under Subtitle C. Arguing that this Court need not look beyond the pleadings and the plain meaning of Section 3001(i), the defendants move for dismissal pursuant to Rule 12(b)(6).

Defendants argue that the "otherwise managing" language in Section 3001(i) "applies to all the waste management activities of a facility, including managing and disposing of the ash residue." Defendants' Memorandum at 15. Therefore, any waste resource recovery facility that "burns only residential and other non-hazardous waste and establishes the requisite contractual or other specified safeguards is not subject to regulation under

Subtitle C." Id. I do not think the meaning of the statute so clear.

Section 3001(i) does not, in plain words, exclude the Facility from those regulations regarding the generation of hazardous waste; that term is nowhere mentioned in the statutory language. Further, the ash produced as a byproduct of the resource recovery process is not specifically exempted from regulation under the terms of Section 3001(i). The "otherwise managing" language of the statute could arguably be read as that sort of general catchall provision often included in involved statutory frameworks.[13/] The

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13/ EDF argues that the plain language of the statutory exclusion, when read in conjunction with the definitional section of the statute, establishes its construction of Section 3001(i). The definitional section of the statute sets forth the meaning of "disposal", "hazardous waste generation", and "hazardous waste management" separately. EDF contends that the separate definition of these terms is dispositive of Congress' intent in enacting Section 3001(i).

> (3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, (continued...)

precise meaning of the phrase is not

13/ (...continued)
leaking, or placing of any solid waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste."

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

42 U.S.C. § 6093(3), (6), (7).

Although the statute does not define "otherwise managing hazardous wastes, the definition most on point is that of "hazardous waste management". Plaintiff concludes that the Facility cannot argue exemption from those regulations governing the generation of hazardous waste and the disposal of the waste it generates because the term generation is defined separately from management and is not specifically mentioned in Section 3001(i). I do not agree.

The definition of "management" is sufficiently broad, particularly in view of the fact that the term disposal is specifically enumerated in Section 3001(i), to warrant examination of the legislative history on the point. I say this also in view of the fact that Section 3001(i) is explicitly termed a clarification of the 1980 household waste exclusion which is understood by the parties to extend to the ash byproduct generated by the waste recovery process. Further, Subtitle C as a whole is captioned "HAZARDOUS WASTE MANAGEMENT," a fact which lends support to defendants' argument that the "otherwise managing" language of the exclusion is meant to exempt the Facility from all regulation under that subtitle.

ascertainable without turning to the legislative history.

B. Legislative History

The legislative history of the 1984 exclusion makes clear Congress' intent to exclude ash generated by an excluded facility from regulation under Subtitle C of the RCRA. Commenting on Section 3001(i), the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, said the following:

> The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.
>
> Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources

> other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.
>
> All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) ("Senate Report") (emphasis added).

The Conference Committee adopted, without change, the provision proposed by the Senate:

> SECTION 223 -- CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION
>
> House Bill. -- No provision.
>
> Senate amendment. -- The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns

> only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.
>
> Conference substitute. -- The Conference substitute is the same as the Senate amendment.

H.R. Conf. Rep. No. 1133, 98th Cong., 1st Sess. 79, 106 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 5649, 5677.

The report of the relevant Senate Committee, delivered contemporaneous with the provision at issue, makes clear that the exclusion was meant to extend to ash and other wastes generated in the process of resource recovery, so as long as the particular facility does not accept hazardous waste for incineration and has in place the appropriate mechanisms for ensuring that no such waste is accepted. The Senate report could not be more explicit. It includes the term "generation", the term upon which EDF places so much emphasis. While it is true that the legislation

itself does not include the term generation and that it is the legislation with which we are concerned, the legislative history is probative on the issue of Congress' intent, given that the scope of the statute is unclear on its face.

Moreover, I think it important to note, as does the report of the Senate committee, that the 1984 statutory provision "clarifies" a previously existing regulatory exclusion, which clearly extended to ash. See supra at n.10. Nowhere in the 1984 exclusion, nor in the Committee report which accompanied it, is there any hint of a congressional intent to limit the scope of that earlier exclusion. EDF argues that the ash resulting from the incineration of household waste remains exempt from regulation under Subtitle C, pursuant to the 1980 exclusion, but that ash generated by a facility that accepts municipal as well as household waste is not

so exempt. I do not think that a fair reading of the statute. More important, neither, according to its declarations, would Congress.

Congress clearly knew of the EPA's interpretation of the 1980 regulation, and had it disagreed, would have made clear its disagreement. See Young v. Community Nutrition Institute, 476 U.S. 974 983 (1986) (quoting NLRB v. Bell Aerospace, Co., 416 US.. 267, 275 (1974)) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"). Instead Congress clarified its "original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." Senate Report at 61.

C. Agency Interpretation

In 1985, the EPA promulgated a regulation that mirrored Section 3001(i). 40 C.F.R. § 261.4(b)(1). In a preamble to the regulation, the EPA interpreted the clarification as follows:

> The statute is silent as to whether hazardous resides from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA does not see in this

> provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste. However, EPA has no evidence to indicate that these ash residues are hazardous under existing rules. EPA does not believe the HSWA [Hazardous and Solid Waste Amendments of 1984] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed. Reg. 28,725-26 (July 15, 1985).

Although at the time of issuing the Preamble, the EPA was manifestly of the view that Section 3001(i) did not wholly exempt ash exhibiting characteristics of hazardousness from regulation as such, that view rests on a questionable reading of the statute and the legislative history. For this reason, the EPA's interpretation,

normally entitled to substantial deference, carries little weight with this Court. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) ("[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress") (citations omitted). The EPA's interpretation of Section 3001(i) is in direct conflict with the expressed intent of Congress as that intent is manifested in the legislative history.

Deference to an agency's construction of the statute which it administers "is appropriate only when Congress has not directly addressed the precise question at issue, Chevron U.S.A. v. N.R.D.C., 467 U.S. 837, 843 (1984), a circumstance that arises if it can fairly be said that Congress 'did not actually have an intent' regarding the point at issue." New York State Motor

Truck Association, Inc. v. City of New York, 654 F. Supp. 1521, 1536 (S.D.N.Y.), aff'd. per curiam, 833 F.2d 430 (2nd Cir. 1987). In the case at bar, the congressional intent with respect to the statutory exemption at issue appears with sufficient clarity from the legislative history.[14/]

Even the EPA appears to have recognized the questionable basis for its determination that ash is subject to regulation as a hazardous waste. On December 3, 1987, J. Winston Porter, the Assistant Administrator for the Office of Solid Waste and Emergency Response, who was then responsible for the implementation of

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14/ Moreover, the EPA's views on the subject are internally inconsistent, even in the 1985 Preamble. To the extent the EPA thought ash exhibiting characteristics of hazardousness should be regulated, it appears to have left open the question of how such regulation should be accomplished. Specifically, the EPA seems to have left for another day the issue of whether a new set of regulations, taking into account existing technology for the treatment of ash, should be promulgated, or whether regulation should proceed under Subtitle C of the RCRA. Of course, whether such regulation would be in violation of Section 3001(i) is a question not before me.

the RCRA at the EPA, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. He did so in response to a letter invitation of the Subcommittee in which it was requested that he address nine separate issues, including the status of incinerator ash. On that question, Porter said the following:

> Currently, EPA's regulations merely restate the statutory language. In the preamble codifying this statutory language, however, EPA advanced an interpretation of the statute that would subject ash residue's [sic] from energy-recovering MWC's [Municipal Waste Combustors] to Subtitle C regulation if the ash exhibited a characteristic of hazardous waste. The Agency has reexamined that interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.
>
> It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the

> section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion. . . . " S. Rep. at 61 (emphasis added).

December 3, 1987 testimony of J. Winston Porter at 16-17. Thus, in 1987, the EPA official responsible for the implementation of the RCRA questioned whether the agency's 1985 interpretation of the statute was consistent with Congress' intent as expressed in the Senate Report. Although Porter did not officially announce a reversal in agency policy on the mat-

ter,[15/] he clearly indicates the EPA's confusion on the point.

On May 11, 1989, Congressman Thomas A. Luken, Chairman of the House Subcommittee on Transportation and Hazardous Materials, called a hearing on H.R. 2162, a proposal to regulate ash as a "special waste" under Subtitle D of the RCRA. In his opening comments, Congressman Luken said the following:

> A statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated.
>
> The very basic question of whether or not ash should be regulat-

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15/ Porter's testimony calls into question the finality with which the EPA views its own 1985 interpretation of Section 3001(i). Porter says the following:

> First, in the near term we [EPA] are planning to develop the following items:
>
> * Technical guidance for the proper handling for MWC ash; and
> * Our legal interpretation of the status of MWC ash with respect to Subtitle C (hazardous waste) and Subtitle D (solid waste) portions of the RCRA.
>
> After taking comment on those above aspects, our intent is to develop a regulation for MWC ash as a "special waste" [under Subtitle D].

December 3, 1987 testimony of J. Winston Porter at 14-15.

> ed under Subtitle D, as a solid waste, or under subtitle C as a hazardous waste, remains ambiguous in the statute.
>
> * * *
>
> This uncertainty has been exacerbated by conflicting signals sent by the EPA. That is not a criticism of EPA.
>
> Originally the EPA stated that incinerator ash must be tested for toxicity, and managed accordingly, but more recently the EPA has made various pronouncements which conflict with that original policy.
>
> It has become clear that legislative action is needed.
>
> * * *
>
> The bill which we will consider today . . . clarifies once and for all that municipal solid waste incinerator ash is to be regulated under subtitle D, and not subtitle C, of RCRA.

Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. 1-2 (May 11, 1989) (emphasis added).

In that May 11, 1989 hearing, Sylvia Lowrance, the then Director of the Office

of Solid Waste, offered the fcllowing comments:

> In our codification of it [Section 3001(i)] we stated that, in our view, the provision excludes energy recovery facilities burning household waste along with nonhazardous waste from commercial and industrial sources from regulation under subtitle C.
>
> With regard to the ash, however, produced from such facilities, we said in a 1985 notice that the ash generated by these facilities which exhibits a characteristic of the hazardous waste must be managed as a hazardous waste.
>
> We continue to follow that 1985 policy, and that is our current interpretation. However, there is substantial controversy surrounding that interpretation. We are in litigation challenging the EPA's interpretation of section 3001(i). We believe the law is ambiguous given it is silent with regard to treatment of ash under that section.
>
> We do believe it needs to be clarified. What we believe is of paramount importance is that ash be safely managed in a technically sound matter.
>
> Until this legal controversy is resolved, there is going to continue to be uncertainty on the part of communities trying to deal with their garbage crisis with regard to what ultimate requirements and costs will be for their municipal solid waste management.
>
> We very much support an approach such as the one taken in H.R. 2162,

> which would provide clear authority to the EPA to regulate municipal combustor ash as a special waste under subtitle D of RCRA.

Id. at 33 (emphasis added); see also id. at 44 ("a special waste program under Subtitle D, tailored to ash, could be consistent, practical, and environmentally safe"). It is clear from Ms. Lowrance's testimony that although she regards official EPA policy to have remained unchanged since 1985, the agency regards the statute as ambiguous on the issue of ash and is desirous of clarification on the point.

Although the EPA's official position has arguably remained unchanged since the agency first interpreted the exclusion in 1985, the agency has certainly called the validity of its own views into doubt, calling for legislative clarification of the issue. Indeed, in the 1987 hearings before the Senate Subcommittee on Hazardous Waste and Toxic Substances, the finality of

that 1985 interpretation was called into question. See supra note 15 ("in the near term we [EPA] are planning to develop . . . [o]ur legal interpretation of the status of MWC ash with respect to Subtitle C (hazardous waste) and Subtitle D (solid waste) portions of the RCRA"). In these circumstances, an additional reason for rejecting the agency interpretation urged upon this Court by EDF[16/] is the "incon-

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16/ Of course, the EPA's interpretation, even if it were entitled to deference in these proceedings, would not be binding on this Court. As an "interpretative rule", the agency's views would at most carry a heightened power of persuasion, but not the force of law.

> As a starting point, . . . the agency's characterization of a rule is "relevant," although not necessarily "dispositive." . . . "An interpretative rule simply states what the administrative agency thinks the [underlying] statute means, and only '"reminds" affected parties of existing duties.' On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule."
>
> * * *
>
> Stated slightly differently, "'interpretative rules are statements as to what the administrative officer thinks the statute or regulation means, '"whereas legislative rules have "effect[s] completely independent of the statute."

(continued...)

sistency of the positions the [EPA] has taken through the years." Immigration and Naturalization Service v. Cardoza-Fonesca, 480 U.S. 421, 446 n.30 (1986).

> An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.

Id. (citations omitted).

D. Subsequent Congressional Views

EDF submits two letters of October 2, 1987, one signed by six Senators and the other by a member of the House of Representatives, in support of its construction of Section 3001(i). The first letter, signed by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, and Mitchell ("Senators' Letter"), addressed to Lee Thomas of the EPA, said the following:

16/ (...continued)
United Technologies Corp. v. United States Environmental Protection Agency, 821 F.2d 714, 718 (D.C. Cir. 1987) (citations omitted) (emphasis in original).

> We are writing to urge that the Agency [EPA] refrain from issuing any policy statements or legal interpretations of the Resource Conservation and Recovery Act as it relates to the management of ash generated by municipal solid waste incinerators pending further consultation and coordination with the Congress. We are concerned that the Agency may be on the verge of interpreting these requirements, possibly in a manner inconsistent with the law, at a time our Committee is considering legislation specifically resolving this issue.
>
> In our view, section 3001(i) of the Solid Waste Disposal Act, often known as RCRA, as amended in 1984 does not exempt owners or operators of municipal solid waste incinerators from their obligations: 1) to determine whether the ash residues generated by the incineration process are hazardous wastes, and 2) to handle ash exhibiting hazardous waste characteristics as hazardous wastes in accordance with the requirements of Subtitle C of RCRA. Thus, we concur in the Agency's statement in the preamble to the July 15, 1985 codification rule that in the 1984 amendments Congress did <u>not</u> "exempt the regulation (sic) of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste."

Senators' Letter at 1.

A similar theme is echoed in the letter of Representative James J. Florio, then Chairman of the House Subcommittee on Commerce, Consumer Protection, and Competitiveness.

> While such an exclusion obviously lacks any justification on environmental grounds, it is equally clear that there is no statutory basis for such an exclusion. Although those seeking an exclusion have focused on the "household waste clarification" contained in the 1984 Hazardous and Solid Waste Amendments, this provision does not exempt owners or operators of municipal solid waste incinerators from their obligations: 1) to determine whether the ash residues generated by the incineration process are hazardous wastes and 2) to handle ash exhibiting hazardous waste characteristics as hazardous wastes in accordance with the requirements of Subtitle C of RCRA.

Letter of Representative Florio to Lee Thomas dated October 2, 1987 at 1 ("Florio Letter").

EDF argues that the views expressed in these letters are entitled to "significant weight . . . particularly . . . when the precise intent of the enacting Congress is

obscure." Plaintiff's Memorandum at 23. In support of that proposition, plaintiff cites Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980). However, that was a case dealing with a committee report which accompanied the legislation at issue. Such is not the case here. The letters on which plaintiff relies were written a full three years after the passage of Section 3001(i). They are not even the contemporaneous views of the authors, much less of Congress as a whole. See Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (citation omitted). Thus the Senators' and Florio letters, while certainly not "waste", are "hazardous" to the present purpose of statutory construction.

Moreover, the intent of the enacting Congress is not obscure. The legislative history makes clear that at the time of its passage, Congress intended Section 3001(i) to exempt ash from regulation under Subtitle C in order to pave the way for increased use of the resource recovery process. It may well be true that such an exclusion "lacks any justification on environmental grounds", Florio Letter at 1, but that is a judgment made with the benefit of hindsight and one that can be acted upon only by Congress, not by this Court.

E. New York Exclusion

It is common ground that the DEC interprets the state exclusion, codified at 6 NYCRR § 371.1(e)(2)(i), to extend to ash residue. However, because "no State . . . may impose any requirements less stringent than those authorized by [Subtitle C]", 42 U.S.C. § 6929, plaintiff argues that New

York's interpretation of its own regulations is invalid under the federal scheme. Of course, that argument turns on the proper construction of Section 3001(i), and for the reasons discussed above I conclude that to be the one set forth by the defendants and not that argued for by EDF.

Although the DEC's interpretation of its own exclusion, which contains language virtually identical to that of the federal statute, could be considered probative of the meaning of Section 3001(i), I need not look to such far removed evidence for a proper construction of the federal statute.

II. Defendant's Compliance with Section 3001(i)

EDF further argues that even if defendants' construction of Section 3001(i) is correct, the Facility cannot advantage itself of the exclusion. That is so, plaintiff contends, because the Facility does not comply with the requirements of

Section 3001(i)(1)(A)(ii) and 3001(i)(2). Specifically, EDF maintains that WTI and Resco have not established that they do not accept hazardous commercial or industrial waste for processing, and that the requisite contractual provisions are in place for ensuring that no such waste is accepted. Plaintiff contends that the lack of such compliance, or defendants [sic] failure to demonstrate such compliance on the present record, precludes the grant of summary judgment in defendants' favor.

A. Contractual Requirements

EDF argues that defendants do not have in place the required mechanisms for ensuring that no "solid waste from commercial or industrial sources", RCRA Section 3001(i)(1)(A)(ii), is accepted for processing by the Facility. Plaintiff concedes that defendants have in place a series of procedural safeguards for guarding against the acceptance of hazardous waste, but it

questions the adequacy of those safeguards. Additional factual background is required at this juncture to understand the contractual provisions at issue.

In 1974, the Westchester County Board of Legislators instituted a Solid Waste Disposal Plan for the County. Pursuant to that plan the County assisted municipalities within the County in their efforts to deal with disposal of municipal solid waste. Resource recovery was emphasized in those efforts. Affidavit of Ronald J. Broglio dated March 19, 1988 at ¶ 5 ("Broglio Affidavit").

The County subsequently entered into Inter-Municipal Agreements ("IMA's") with 35 municipalities in the County. Those municipalities generate approximately 90% of the municipal solid waste in Westchester county. Id. at ¶ 6. The IMA's provide that each municipality deliver a minimum amount of the solid waste collected by the

municipality to the County's solid waste disposal system.[17] A fee is paid for the disposal services. Id. The County's waste disposal system is operated through the District.

In 1981, Westchester County, the Westchester County Industrial Development Agency ("Agency"), and Wheelabrator-Frye Inc. entered into a Solid Waste Disposal Agreement ("Agreement"). That Agreement

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[17] The County's disposal system includes, but is not limited to the Facility and Sprout Brook. Also included in the County System are five waste transfer stations, all of which are located within the County itself. Broglio Affidavit at ¶ 7.

governs the disposal of waste at the Facility.[18/]

The Agreement states that the Facility is not designed to "store or process toxic, pathological, biological or other hazardous wastes which by law require special handling in their collection, treatment or disposal." Agreement at 2.03(b)(i). The Agreement further provides that Resco "operate the Project in compliance with all applicable federal, state and local laws and regulations . . . relating to environmental control . . . and other regulatory requirements." Id. at 5.04. Section 5.04 of the Agreement makes clear that Resco can

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18/ Resco consented to be bound by the Agreement pursuant to an Assignment and Assumption Agreement dated September 30, 1982.

On October 1, 1982, the County withdrew as a party to the Agreement. The Agency and the District then entered into a separate agreement, the Solid Waste Disposal Service Agreement ("Service Agreement"), which requires the District to deliver the solid waste received from the municipalities pursuant to the IMA's to the Facility for disposal. Under the Service Agreement, the District is essentially subject to the same requirements as is the Agency under the Agreement. Furthermore, the IMA's were assigned by the County to the District. Broglio Affidavit at ¶ 31.

refuse to take certain actions if in its judgment such actions would amount to a violation of any statute or governmental rule, including the RCRA.[19/] That same provision requires the County to use its best efforts to ensure that the Facility is not classified as a hazardous waste facili-

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19/ The relevant portion of Section 5.04 reads as follows:

> Notwithstanding any other provisions of this Agreement, Resco shall not be obligated hereby to take any action which, in its reasonable judgment, would result in the violation of any statute or governmental rule, regulation or requirement, including, without limitation, the Resource Recovery [sic] Conservation Act of 1976, or adversely affect the operation of the Facility. The Agency agrees to use its best efforts to take all necessary or appropriate action to ensure that the Facility does not become classified as a hazardous or toxic materials storage or processing facility and, without limiting the generality of the foregoing, the Agency agrees that it will not, and will use its best efforts to cause the Municipalities not to, contract for the disposal by the Facility of any Special Handling Waste . . . or of any other Solid Waste which Resco reasonably determines and notifies the Agency is likely to cause damage to or adversely affect the operation of the Facility . . . provided that neither the Agency nor any Municipally Collected Solid Waste any Special Handling Waste included therein during normal municipal collections.

(emphasis in original).

ty, and that it will not contract for the delivery of or itself deliver special handling waste,[20/] which includes hazardous waste, to the Facility. Analogous restrictions are found in the Service Agreement, the IMA's, and the contracts with the outside operator of the County's five transfer stations.

20/ Special Handling Waste is defined by the Agreement as follows:

> (a) radioactive, toxic, pathological, biological and other hazardous wastes which according to federal, state or local rules or regulations from time to time in effect require special handling in their collection, treatment or disposal; (b) explosives and hazardous chemicals which are likely to cause damage to or adversely affect the operation of the Facility; (c) dirt, concrete and other nonburnable construction material and demolition debris; (d) large items of machinery and equipment, such as motor vehicles and major components thereof (transmissions, rear ends, springs, fenders), agricultural equipment, trailers and marine vessels, and other oversize items, including tree trunk sections and branches in excess of six feet in length and eight inches in diameter, which are likely to interfere with the operation of the Facility; and (e) other materials which are likely to cause damage to or adversely affect the operation of the Facility.

Agreement, Article I at 11.

Furthermore, the truck drivers of those private carters who are authorized to deliver to the Facility for the County's account, are required to sign a certification as to the type of waste being delivered. In essence, the certification states that no hazardous waste or other prohibited substance is contained in the load.

Although the terms of Section 3001(i)(2) are clear in that only contractual requirements or notification or inspection procedures are required to comply with the statute, the Facility also has in place notification procedures. Specifically, a sign is posted in plain view of the trucks as they enter the Facility, the substance of which is a statement as to what types of waste the Facility will and will not accept for processing. Broglio Affidavit at ¶ 14. The trucks arriving at the Facility are subject to random inspection at any time.

Id. at ¶ 16. Trucks arriving at the station must pass through a weigh station at which point their loads are checked with a radiation detective device. Id. at ¶ 15. Defendants represent that any load failing the radiation test is not accepted for processing. Id.

1. Small Quantity Generators

Plaintiff argues that defendants' contractual safeguards are inadequate because they do not account for hazardous waste produced by individuals or entities known in the regulatory scheme as "small quantity generators."[21/] It is common ground that the hazardous waste produced by these small quantity generators is not exempted from classification as hazardous. See 40 C.F.R. § 261.4. However, it is exempt from many of the regulations govern-

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21/ The regulations promulgated by the EPA provide that "[a] generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous waste in that month." 40 C.F.R. § 261.5(a).

ing the management of hazardous wastes. EDF argues that Section 3001(i) requires a resource recovery facility to refrain from accepting hazardous wastes, including that produced by small quantity generators, and to maintain contractual safeguards which ensure that no such waste is accepted for processing.

Specifically, EDF contends that the provision regarding Special Handling Waste, supra at n.20, does not ensure that hazardous waste from small quantity generators will not be accepted for processing. That is so, plaintiff maintains, because hazardous waste produced by small quantity generators does not require special handling and therefore would not come within the category of waste prohibited by the Agreement. Defendants maintain that a proper reading of the regulations reveals that the Facility is not required to turn away hazardous waste produced by small

quantity generators, but that if it is so required under law, the proper procedural safeguards are in place.

I thus address whether, as a matter of law, hazardous waste produced by small quantity generators may be accepted by a resource recovery facility without that facility losing its exempt status under Section 3001(i). The pertinent regulation provides that the small quantity hazardous waste generator may deliver its waste to an off-site facility for disposal where such facility is "[p]ermitted, licensed, or registered by a State to manage municipal or industrial solid waste." 40 C.F.R. § 261.5(g)(3)(iv). It would make no sense to allow small quantity generators to dispose of their waste in a facility licensed to deal with municipal or industrial waste and then to deem that facility a hazardous waste disposal site subject to regulation as such. Such a construction

would vitiate the right of the small quantity generator to contract for the disposal of its waste with a non-hazardous waste facility, which perforce would become a hazardous waste facility upon acceptance of the small generator's waste.

I therefore hold that the Facility may accept hazardous waste from small quantity generators without subjecting itself to regulation as a hazardous waste disposal facility.[22/]

2. Requirement to Reject Hazardous Waste

The second argument EDF makes in support of its contention that the procedural safeguards are inadequate is that

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22/ This conclusion is consistent with the EPA's determination that "'[a] sanitary landfill that receives household wastes . . . and only those hazardous wastes generated by small-quantity generators will not be considered a hazardous waste disposal facility and will not require a RCRA permit.'" Defendants' Reply Memorandum at 27-28 n.* (quoting U.S. Environmental Protection Agency, Questions and Answers on Hazardous Waste Regulations at New Facilities -- Sanitary Landfills (1980), quoted in, J. Stensvaag, Hazardous Waste Law & Practice § 6.32 at 6-103 & n.29 (1986)).

defendants are nowhere required to reject hazardous waste if it is brought to the Facility for disposal. EDF relies principally on that portion of Section 5.04 of the Agreement, supra at n.19, that states as follows: "neither the Agency nor any Municipality shall be required to separate out from Municipally Collected Solid Waste any Special Handling Waste included therein during normal municipal collections." Of course, that provision deals with what the municipalities must do in respect of separating out hazardous from non-hazardous waste.

However, the County and the Agency clearly remain under contractual obligation to use their best efforts to ensure that no Special Handling Waste, including hazardous waste, is delivered to the Facility. Agreement Section 5.04 and 5.06. No absolute guarantee is present in these precautions, and as a practical matter

probably could not be given. In any event, none is required by the statute. 1985 Preamble, 50 Fed. Reg. at 28,725 ("the statutory language contains no exception [from the Section 3001(i) exemption] for facilities that, in spite of their best efforts, receive hazardous waste"). Consistent with the statute, the 1985 preamble requires only that "good faith precautionary" measures against the acceptance of hazardous waste be in place. Nowhere is an absolute guarantee required.

Moreover, while the County and the Agency have made no absolute guarantees not to deliver hazardous waste for disposal, the operating permit obtained from the DEC expressly prohibits the processing of such waste. That permit provides as follows:

> Facility shall accept for incineration only municipally and commercially collected residential and commercial refuse. The following waste shall not be accepted at this facility: septage; sewage sludge less than 20% solids by weight; industrial

> waste (unless approved by this Department); liquid wastes, industrial sludges, explosive or other type of hazardous waste as listed in 6 NYCRR Part 366.

Permit at ¶ 1,[23/]

In sum, the contractual provisions in place are adequate under the statute. Consequently, plaintiff's objection to the procedural safeguards maintained by the defendants fails.

B. Actual Receipt of Hazardous Waste

EDF next argues that judgment cannot enter in favor of defendants on account of their failure to establish that hazardous waste is not actually accepted by the Facility. Plaintiff further maintains that

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23/ EDF argues that little comfort can be taken in the terms of the operating permit because Part 366 has been repealed. However, the DEC adopted successor Part 371 concurrent with the repeal of Part 366. Resco thus remains responsible for operating the Facility in compliance with Part 371 and "all applicable laws, rules or regulations, including rules and regulations of the department promulgated pursuant to subdivision one of section 27-0703 and taking effect after the date application [for the operating permit] was made to the department." N.Y. Envtl. Conserv. Law § 27-0707(5).

even if defendants have made out a paper case on point, judgment should not enter in advance of EDF's taking discovery pursuant to Rule 56(f).

In order to qualify for the resource recovery exemption, a facility must not only have in place the appropriate procedural safeguards, Section 3001(i)(2), but must also not accept hazardous waste from commercial or industrial sources for processing. Section 3001(i)(1)(A)(ii). In other words, the Facility must show that the procedural safeguards it has in place work in keeping out hazardous waste.

The statute does not require a showing that absolutely no hazardous waste from the municipal waste stream is ever accepted for processing. Rather, the Senate Report says the following:

> [S]uch facilities cannot accept hazardous waste identified or listed under section 3001 from commercial or industrial sources, and must establish contractual requirements or

> other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary measures they establish to assure against the receipt of such hazardous waste.

Senate Report at 61 (emphasis added).[24/]

Defendants represent that the Facility does not "knowingly accept or burn hazardous commercial or industrial waste." Supplemental Affidavit of Ronald J. Broglio sworn to on June 2, 1988 at ¶ 1. Defendants further state that "Resco would not

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[24/] The EPA is also of the view that "resource recovery facilities do not become Subtitle C facilities when they inadvertently burn hazardous waste if they have taken good faith measures to avoid burning such waste." 1985 Preamble, 50 Fed. Reg. 28,725.

in fact accept or process any such waste of which it was aware," id. at ¶ 4, and that "[i]f hazardous commercial or industrial waste were discovered at the Facility, Resco would not process [it]." Id. at ¶ 8. Accepting these statements as true, they focus on whether the Facility would knowingly burn hazardous waste, and the defendants state that they would not. Nowhere do defendants directly address the issue of the frequency with which hazardous waste is processed, however inadvertent such processing may be. The statute protects the Facility from regulation under Subtitle C only if the acceptance of hazardous waste is not only inadvertent, but occasional. Senate Report at 61.

Of course, the implication of defendants' statements is that the Facility does not process hazardous waste. That implication is not sufficient to carry the day on the affirmative defense. See United States

v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967) (party claiming "benefits of an exception to the prohibition of a statute" carries the burden of establishing that it comes within the exception).

Although EDF makes no particular showing that hazardous waste is in fact accepted by the Facility, it could not have done so as the facts necessary to that showing are within the exclusive control of defendants, and discovery has not yet been taken. Therefore, plaintiff argues that even if the representations of defendants are sufficient to establish that the Facility is deserving of protection under the statutory exclusion, discovery should proceed on that point prior to the entry of judgment. I agree. Rule 56(f) was created for just such a situation. The plaintiff cannot "present by affidavit facts essential to justify [its] opposition" as those

facts are uniquely within the possession of the defendants.

Moreover, although plaintiff has made no particular showing that hazardous waste has been accepted by the Facility, there is some reason to believe that a possibility. Specifically, EDF asserts that "typical municipal wastestreams contain hazardous wastes contributed to the wastestreams by small quantity generators, as well as hazardous wastes illegally contributed by other generators." Affidavit of Richard A. Denison sworn to on May 2, 1988 at ¶ 30. I therefore make the direction that discovery proceed in this case on an expedited basis, limited to the questions of whether and with what frequency the Facility accepts hazardous waste for processing.

III. Primary Jurisdiction

Finally, defendants argue that the case should not be decided in this Court, but rather should be decided initially at

the administrative level. Defendants state that the EPA is addressing the question of ash management in two separate agency actions and a decision by this Court should await determination of those proceedings. Specifically, defendants point to the EPA's review of New York's application for final approval of various provisions of its hazardous waste program, including the household waste exclusion;[25/] and the EPA's expected issuance of technical

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25/ Although New York has received final approval for its state hazardous waste program generally, it has not yet been authorized to enforce any of the requirements or prohibitions of the 1984 amendments, including the household waste exclusion. Pursuant to Section 3006(g)(1), the strictures of the 1984 amendments are to be administered by the EPA pending final authorization of the state program. 42 U.S.C. § 6926(g)(1).

On December 28, 1987, EPA granted approval of New York's draft application concerning the household waste exclusion and gave New York until May 7, 1988 to submit its final application. The preliminary approval of the state's exclusion endorses the wording of the exclusion, which is identical to that promulgated by the EPA, but cannot fairly be read to sanction the DEC's interpretation of that exclusion. That imprimatur would come only with final approval of the application, which has not yet happened. To date, final approval has not been granted.

guidance for the handling, transportation and disposal of ash.

The doctrine of primary jurisdiction is recognized as a "flexible concept, concerned with 'promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.'" Board of Educ. of City School Dist. v. Harris, 622 F.2d 599, 606 (2d Cir. 1979) (citation omitted), cert. denied, 449 U.S. 1124 (1981). On the subject of invoking the doctrine of primary jurisdiction, the Second Circuit has said:

> The exercise of the court's discretion is guided in this situation by a desire for uniformity of regulation and the need for initial consideration by a body possessing special expertise on the issue presented.

Id. (citations omitted). In exercising that discretion, the court of appeals has further said that "[i]t is well established that the courts need not defer to an agency where the issue involved is strictly a

legal one, involving neither the agency's particular expertise nor its fact finding prowess." Id. at 607 (citations omitted); see also General Elec. Co. v. MV Nedlloyd, 817 F.2d 1022 (2d Cir. 1987) ("courts ordinarily do not defer when the issue involved is purely a legal question, one not involving agency expertise or experience") (citation omitted), cert. denied, 108 S. Ct. 710 (1988). The case at bar presents precisely such a situation.

The instant controversy centers on the proper construction of Section 3001(i), a purely legal issue. The policies underlying the primary jurisdiction doctrine would not be furthered by awaiting agency decision on that point. Moreover, the status of the administrative actions referred to is unclear. The EPA is clearly of the view that guidance on the proper construction of the exclusion is necessary. See Letter of Lee M. Thomas Administrator of the EPA to

tion on this issue would be very desirable").

Conclusion

Plaintiff's motion for summary judgment is denied.

Defendants' motion to dismiss in favor of an agency determination is denied.

Defendants' motion for summary judgment is denied for the reasons stated herein. Expedited discovery is to proceed in accordance with the terms of this Opinion. An order of reference to a supervising Magistrate is being entered concurrent with this Opinion.

SO ORDERED.

Dated: New York, New York
November 21, 1989

/s/
CHARLES S. HAIGHT, JR.
U. S. D. J.

STATUTES AND REGULATIONS

42 U.S.C. § 6903

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may -

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(12) the term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(24) The term "resource recovery facility" means any facility at which solid

waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amendable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or

chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6921(d)

Small quantity generator waste

(1) By March 31, 1986, the Administrator shall promulgate standards under sections 6922, 6923, and 6924 of this title for hazardous waste generated by a generator in a total quantity of hazardous waste greater than one hundred kilograms but less than one thousand kilograms during a calendar month. . . .

(6) Standards promulgated as provided in paragraph (1) shall, at a minimum, require that all treatment, storage, or disposal of hazardous wastes generated by generators referred to in paragraph (1) shall occur at a facility with interim status or a permit under this subchapter, except that onsite storage of hazardous waste generated by a generator generating a total quantity of hazardous waste greater

than one hundred kilograms, but less than one thousand kilograms during a calendar month, may occur without the requirement of a permit for up to one hundred and eighty days. Such onsite storage may occur without the requirement of a permit for not more than six thousand kilograms for up to two hundred and seventy days if such generator must ship or haul such waste over two hundred miles.

42 U.S.C. § 6921(i)

Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if-

(1) such facility-

(A) receives and burns only-

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6922

Standards applicable to generators of hazardous waste

(a) In general

Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting-

(1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environ-

ment, and the disposition of such wastes;

(2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;

(3) use of appropriate containers for such hazardous waste;

(4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;

(5) use of a manifest system and any other reasonable means necessary to assure that all such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the

waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit program pursuant to this subchapter) at least once every two years, setting out-

(A) the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year;

(B) the disposition of all hazardous waste reported under subparagraph (A);

(C) the efforts undertaken during the year to reduce the

volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

(b) Waste minimization

Effective September 1, 1985, the manifest required by subsection (a)(5) of this section shall contain a certification by the generator that-

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

42 U.S.C. § 6923

Standards applicable to transporters of hazardous waste

(a) Standards

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings, the Administrator, after consultations with the Secretary of Transportation and the States, shall promulgate regulations establishing such standards, applicable to transporters of hazardous waste, identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall include but need not be limited to requirements respecting -

(1) recordkeeping concerning such hazardous waste transported, and their source and delivery points;

(2) transportation of such waste only if properly labeled;

(3) compliance with the manifest system referred to in section 6922(5) of this title; and

(4) transportation of all such hazardous waste only to the hazardous waste treatment, storage, or disposal facilities which the shipper designates on the manifest form to be a facility holding a permit issued under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1141 et seq.].

42 U.S.C. § 6924

Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities

(a) In general

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. In establishing such standards the Administrator shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regula-

tions. Such standards shall include, but need not be limited to, requirements respecting-

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste

treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable; and

(7) compliance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal.

No private entity shall be precluded by reason of criteria established under paragraph (6) from the ownership or opera-

tion of facilities providing hazardous waste treatment, storage, or disposal services where such entity can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous waste. [Footnote omitted.] . . .

42 U.S.C. § 6925

Permits for treatment, storage, or disposal of hazardous waste

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section.

Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of title 15 for the incineration of polychlorinated biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter. [Footnote omitted.] . . .

40 C.F.R. § 261.3

Definition of hazardous waste.

(a) A solid waste, as defined in § 261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and

(2) It meets any of the following criteria:

(i) It exhibits any of the characteristics of hazardous waste identified in subpart C except that any mixture of a waste from the extraction, beneficiation, and processing of ores and minerals excluded under § 261.4(b)(7) and any other solid waste exhibiting a characteristic of hazardous waste under subpart C of this part only if it exhibits a characteristic that would not have been exhibited by the excluded waste alone if such mixture had not occurred or if it continues to exhibit any of the

characteristics exhibited by the non-excluded wastes prior to mixture. Further, for the purposes of applying the Extraction Procedure Toxicity characteristic to such mixtures, the mixture is also a hazardous waste if it exceeds the maximum concentration for any contaminant listed in table I to § 261.24 that would not have been exceeded by the excluded waste alone if the mixture had not occurred or if it continues to exceed the maximum concentration for any contaminant exceeded by the nonexempt waste prior to mixture.

(ii) It is listed in Subpart D and has not been excluded from the lists in subpart D under §§ 260.6 and 260.22 of this chapter. . . .

40 C.F.R. § 262.20

General Requirements

(a) A generator who transports, or offers for transportation, hazardous waste for offsite treatment, storage, or disposal must prepare a Manifest OMB control number 2050-0039 on EPA form 8700-22, and, if necessary, EPA form 8700-22A, according to the instructions included in the Appendix to Part 262.

40 C.F.R. § 263.20

The manifest system.

(a) A transporter may not accept hazardous waste from a generator unless it is accompanied by a manifest signed in accordance with the provisions of 40 CFR 262.20. In the case of exports, a transporter may not accept such waste from a primary exporter or other person (1) if he knows the shipment does not conform to the EPA Acknowledgement of Consent; and (2) unless,

in addition to a manifest signed in accordance with the provisions of 40 CFR 262.20, such waste is also accompanied by an EPA Acknowledgement of Consent which, except for shipment by rail, is attached to the manifest (or shipping paper for exports by water (bulk shipment)).

1985 Preamble

4. Household Waste

New section 3001(g) adds a clarification to the household waste exclusion contained in § 261.4(b)(1). That regulation stats that household wastes are not hazardous wastes. The preamble accompanying that regulation states that residues remaining after treating household wastes also are not hazardous wastes. 45 FR 33099 (May 19, 1980).

The legislative clarification is that a resource recovery facility recovering energy from burning municipal waste is not

considered to be managing hazardous waste, provided the facility meets two conditions:

(a) the facility receives and burns only household waste, and solid waste from other sources that contains no [sic] hazardous wastes; and

(b) the facility cannot accept hazardous wastes from any non-household sources, and must adopt precautionary measures - such as contractual arrangements of other notification procedures - to assure that hazardous wastes are not received or burned.

EPA has codified this provision in § 261.4(b), repeating the statutory language. The statutory provision appears to raise two principal issues:

(1) The statute of facilities that, in spite of good faith efforts, receive and burn hazardous wastes; and

(2) The status of residues from burning household waste and non-hazardous

solid waste if the residue exhibits a characteristic of hazardous waste.

As to the first issue, the statutory language contains no exception for facilities that, in spite of their best efforts, receive hazardous wastes. The legislative history indicates, however, that if good faith precautionary measures are in place and a resource recovery facility still receives and burns a hazardous waste, that the "facility * * * should not be penalized for the occasional, inadvertent receipt of hazardous waste * * *" S. Rep. No. 284 at 61. Thus EPA believes that resource recovery facilities do not become Subtitle C facilities when they inadvertently burn hazardous waste if they have taken good faith measures to avoid burning such waste.

The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues

would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question, although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if non hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believe that the principal purpose of section 3001[i] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result, from becoming subject to the Subtitle C regulations. EPA

does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste. However, EPA has no evidence to indicate that these ash residues are hazardous under existing rules. EPA does not believe the HSWA impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.